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ABSTRACT

This chapter focuses on the need for a revised relationship between schools and the courts through the concept of preventive law. The chapter reviews court cases and presents an overview of conflict resolution models and strategies for reducing litigation. Preventive law assumes that greater use of its strategies affords a lesser need for conflict resolution through litigation. An abundant area for school litigation has been racial discrimination, as well as protection against other individual constitutional deprivations. Lawsuits are on the increase in personal injury torts and defamation cases. Legal liability among school boards may result from such areas as district-owned vehicles, corporal punishment, teacher performance evaluations, inappropriate due process, and unsafe school buildings. Preventive law is most effectively practiced in the context of policy review. A preventive model establishes the process through which district policies and decisions are screened. This proactive approach uses corrective actions before problems arise. Implementation involves commitment, communication, and compromise. Strategies include regular communication among teachers, administrators, and parents; improved understanding of education law; consistent implementation; periodic internal review; and external preventive law audits. The proactive approach produces a legal relationship leading to effective school administration. Three models of conflict resolution are diagrammed. (CJH)

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Preventive Law for School Administrators

Harold L. Hawkins

School administrators and school boards are in legal difficulty. Too often school officials find themselves in court defending causes that are not easily defended; on the other hand courts sometimes appear to want to take over the administration of the public schools. This situation results neither from the incompetence of educators nor from a conspiratorial judiciary. Instead, an era of litigation in education has evoked an untenable relationship between schools and the courts that demands reexamination.

This chapter reflects on education and the law. Its *focus* is the need for a revised relationship between schools and the courts. The concept of preventive law is presented as a basis for a new perspective on law in education. The legal reform advocated is derived from a brief overview of conflict resolution models and the use of strategies for reducing litigation.

The challenge of developing a revised relationship represents an opportunity for the legal profession as well as educators. Preventive law, like due process which resulted from legal reform, has the potential for significant impact on educational practice. An emerging concept, preventive law, points to a way out of the current morass of litigation that is costly in time, dollars, and emotional overload. In fact, the idea of prevention is so startlingly simple that one might proclaim its advent as a rediscovery of common sense.

Brown, recognized as one of the first to advocate preventive law, put it concisely this way: "It usually costs less to avoid getting into trouble than to pay for getting out of trouble."[1] During his practice in corporate law, Brown recognized that through unnecessary mistakes legal rights are often jeopardized. Although the concept of preventive law is less well known in educational settings, it could be substantially helpful in ending the era of litigation. How does this emerging view of education and the law work? Its application in dispute settlement can be stated as: "In education, preventive law is the voluntary revision of school policies and procedures to lessen or obviate potential litigation."[2]

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1. L. Brown, Preventive Law 3 (1950).
2. H. Hawkins, Preventive Law: Strategies for Avoidance of Litigation (publication pending).

Note that the stated definition speaks of the need to reduce litigation. Preventive law recognizes that some litigation is essential. Judicial review has provided education with many instances of improved procedure, clarification of meaning, and protection of individual rights. It is obvious that not all litigation can be or should be avoided. Rather the emphasis in preventive law is the avoidance of unnecessary law suits and the increased potential for the school district to have its actions affirmed by the courts when there is judicial intervention. The concept of preventive law makes one basic premise: *The greater the use of the preventive law strategies in public schools, the less the need for conflict resolution through litigation.*

Adjudication: Wrongs and Remedies

Disagreements in school districts too often result in adjudication, the intervention of the judiciary in conflict resolution. When a dispute moves to this level of decision-making, the legal system replaces educational administration as the key to the search for justice. Hudgins and Vacca describe the heart of adjudication in these terms:

> At the very core of the American legal system is the principle that for every *wrong* (violation of a right) done to an individual by government or by another individual, there should be a *remedy* (some form of compensation or relief) provided. A citizen must be protected from injustice and must also have some place to go (when all else fails), to seek justice. In our social structure the courts of this nation exist for such purposes.[3]

In schools, the most abundant area for litigation has been racial discrimination, protection against other individual constitutional deprivations has followed closely. Other prolific problems have related to lack of due process, use of corporal punishment, church-state issues, student dismissal, and contract non-renewals. Discussion at a recent joint school board-superintendent conference in San Antonio revealed another significant cause for concern. Liability claims in school districts are a major threat to legal and fiscal stability. Since *Monell v. Department of Social Services of the City of New York*,[4] the fastest growing area of litigation has involved the various types of liability. With this 1978 decision establishing school districts as "persons" in section 1983 cases, school district treasuries have been viewed by many as open markets for litigation. Law suits are vigorously on the increase in personal injury torts, defamation cases, and civil rights deprivation. As a result, seven of ten liability insurance carriers in Texas have discontinued their coverage to school districts and the remaining three have increased premium rates by staggering proportions.

3. H. Hudgins, Jr. & R. Vacca, Law and Education: Contemporary Issues and Court Decisions 3-4 (1974).

4. 436 U.S. 658 (1978).

Wrongful actions by school boards and administrators in the context of legal liability may result from these potential problem areas, to name a few: (1) district owned vehicles; (2) corporal punishment; (3) teacher performance evaluations; (4) inappropriate due process; (5) inadequate duty of care through employment of untrained personnel; (6) unsafe school buildings; (7) overcrowded physical space in certain types of instruction; and (8) failure to correct identified hazards. How does this developing problem relate to preventive law? Preventive law recognizes the transfer of risk through adequate insurance protection, but it also stresses the reduction of claims through the systematic review of operational policies and procedures. Putting its own house in order through preventive law measures will not only lessen the number of legal "wrongs" but will increase the capability of the school district to obtain and maintain adequate insurance protection. Actually some authorities suggest that risk management through insurance coverage should be the last step taken by the school board, after all other preventive measures have been accomplished.

Whether the context is legal liability or issues in curriculum, "putting the house in order" often involves careful consideration of school district policies. Preventive law is perhaps most easily practiced in the context of policy review. Although even in policy revision the attempt to prevent "wrongs" is often more involved than at first seems apparent. There are at least five factors relevant to school districts that provide opportunities for improvement. These are: (1) lack of school policy(ies), (2) vague and unclear policies, (3) disregard for affirmed policies, (4) inconsistent application of existing policies, and (5) unwillingness to admit error.

Case law is replete with litigation arising from poorly administered policies. Sometimes school districts lack policies to serve specific needs. In *Green v. County School Board*,[5] the court required that the board must recognize and institute a policy regarding school district integration that would be effective. The vagueness of policy issue was determined by the court in *Elfbrant v. Russell*.[6] A district policy demanding a disclaimer of association with "subversive organizations" was overturned on the basis that its meaning was too vague for a teacher to safely swear to. Inconsistent application of a policy for renting the school districts' auditorium to civic groups at nominal cost was shown in a 1973 case. The National Socialist White Peoples' Party had applied to use the auditorium. The board's refusal was contrary to their policy and not upheld by the court.[7]

Policy administration can also cause problems for non-public schools. The failure of a private school to keep educational records required by the state to license a student to practice skills taught at vocational

5. 391 U.S. 430 (1968).
6. 384 U.S. 11 (1966).
7. National Socialist White People's Party v. Ringese, 473 F.2d 1011 (1973).

school, was ruled a disregard of approved policy. The student, therefore, was justified, the court said, in not paying his tuition.[8]

In a 1980 teacher contract non-renewal case, an unwillingness to admit error by the board of the Kingsville (Texas) Independent School District demonstrated how prolonged and costly litigation can be. In this case, the teacher was dismissed by board action which was independent of stated policy, and counter to superintendent and principal recommendations. The district lost its case after litigation that covered a span of seven years and exceeded $143,026 in cost.[9]

A Rationale for Preventive Law

The acceptance of preventive law may be enhanced by understanding the way in which conflicts (disagreements) in educational institutions are treated. The administrative/judicial functions of administrators and school boards include a basic responsibility for settling disputes. Figure 1 depicts the process used generally in school districts for conflict resolution. The appropriate school district personnel operating within the internal forces of the district and the community typically apply policies and procedures to examine their actions (decisions) that are alleged to be incorrect. The administrative mechanism seeks and applies solutions, usually this process which also may need to utilize external forces, or resources, will accommodate, as best it can, the needs generated by the problem. The model designates this process as existing in an *active* mode since its use is somewhat regular and routine.

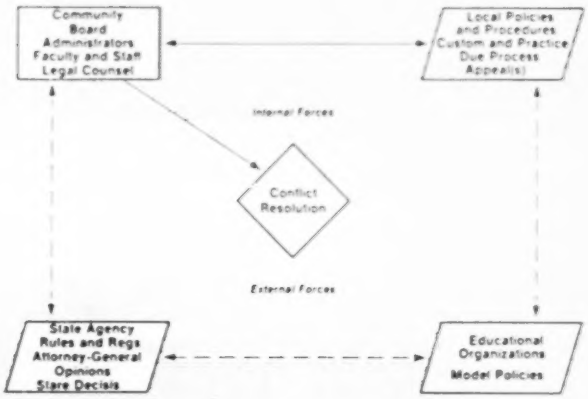
The litigation model of problem resolution is demonstrated in Figure 2. Here the attempt to seek a harmonious solution is viewed as in the *reactive* mode; the pressures for settlement are stronger, decisions are not initially accepted and the result eventually necessitates the involvement of the judicial system. With the court participation the resolution to the conflict comes from outside school system channels and is a forced remedy. Often the litigation model results in decisions unacceptable to one party and sometimes not to either. Eventually the litigation that has moved through various appellate levels will provide an end to the disagreement. The era of litigation in education during the past 25 years reflects a disproportionate dependence upon judicial remedies by school boards as well as those individuals alleging wrongs.

The preventive law model presented in Figure 3 establishes the preventive law process through which all school district policies, procedures, and decisions are screened. This approach to conflict resolution is viewed as in a *proactive* mode because it is based on the use of corrective action before specific problems arise. Note that not all litigation is avoided. In theory, both the total volume of conflicts is reduced and the use of the courts for litigation is substantially lessened. The preventive law process by its very nature produces a more positive relationship between the school and the courts.

8. Scierton v. Leech, 242 So. 2d 269 (1971).
9. Kingsville Independent School District v. Cooper, 611 F.2d 1105 (1980).

Figure 1

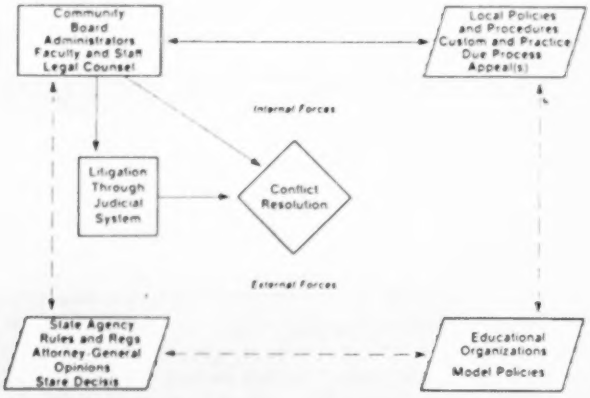
Political/Administrative Model
Active Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending)

Figure 2

Litigation Model
Reactive Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending)

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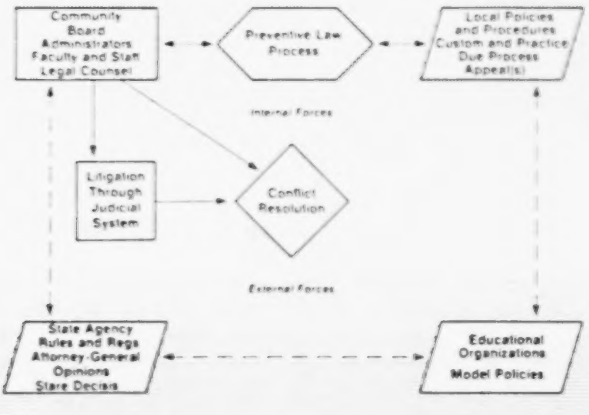
Figure 3

Preventive Law Model
Proactive Mode for Conflict Resolution



Source: Harold L. Hawkins, *Preventive Law: Strategies for Avoidance of Litigation in Public Schools*, University Council for Educational Administration, Tempe, Arizona (Publication pending)

Preventive Law Strategies

Public school administrators and boards of education will find the idea of preventive law worthy of consideration. Understandably some will maintain that much of the process is already in use; there is some truth in this point of view. What has been lacking, however, is an understanding of the comprehensive nature of prevention and the value that its use can be to education. Frels[10] stresses three essential aspects of preventive law implementation. These are: (1) commitment, (2) communication, and (3) compromise. It is clear that before tangible benefits will accrue fully, a commitment to the proactive approach basic to preventive law is necessary. An acceptance of the belief that schools must themselves resolve a greater portion of their conflicts might appear relatively easy. Nevertheless, it is the extensive voluntary effort that ensues which will test the degree of commitment that exists. Communication is a major aspect of any plan to exercise increased prevention. To be effective, audiences of that communication should include levels of faculty, staff, and parents. The third emphasis is that of compromise. Frels believes

10. Kelly Frels, legal counsel for the Houston (Texas) Independent School District offered these views at the joint meeting of the Texas Association of School Boards and the Texas Association of School Administrators at San Antonio, September 28, 1985.

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that in the legal arena there must be some give and take. Progress often must be incremental when changes are attempted. Compromise depends upon a willingness to engage in efforts to identify and accept trade-offs.

Hawkins suggests a number of strategies that are useful to those ready to implement preventive law practice in their school systems. His techniques include:

Strategy 1: Increased communication on a regular basis among teachers, administrators and parents.
Strategy 2: Improved understanding of education law.
Strategy 3: Strengthened consistency in the implementation of policies and procedures.
Strategy 4: Periodic internal review of school district policy.
Strategy 5: Development of systems for external preventive law audits.[11]

These strategies may be applied in a non-sequential manner; each is independent of the others. The ease of implementation, though, from the first to the last strategy follows a somewhat increasingly difficult pattern. Strategies 1-3 require concentrated effort but can be used with relatively little extra time and expense on the part of the school system. Strategy 4 constitutes a significant step in terms of commitment. The internal review might be conducted by a board administrator committee. Lay representation would be appropriate as well as the technical assistance of legal counsel. The external audit as strategy 5 is still in the developmental stage. Instrumentation and procedures have been discussed by preventive law advocates. Progress, however, has been limited to preliminary attempts to define the process. The voluntary external audit differs from internal review in its formal structure and its emphasis on outside legal expertise. The audit team is presumed to be composed, at least partly, of individuals from outside the local school district.

A Closing Word

Preventive law is a viable concept. Its relevance at this time to education is readily apparent. One should not, however, consider it a panacea for all the legal problems in education. The proactive approach, if practiced, jointly by school officials and attorneys will produce a new legal relationship leading toward more effective school administration.

11. *See* H. Hawkins, *supra* note 2.